IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 21

CAROLENE PRODUCTS COMPANY, a corporation,
CHARLES HAUSER and WILLIAM H. HARTKE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS REPLY BRIEF.

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Law Brief Press—NYC

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PETITIONER'S REPLY BRIEF.

I.

Rationale and Constitutionality.

Throughout respondent's brief, the judgment below is sought to be justified by references to what was said of Carolene in Congress in 1923, ignoring completely the fact that although the *name* is still the same, the Carolene of today is not the product that was known by that name in 1923, and that the difference lies in the *presence*, in the Carolene of today, of the very ingredients whose *absence*, in the Carolene of 1923, was the basis of, and the reason for, the statements then made.

To cite a few illustrations:

(1) On page 8 of respondent's brief, reference is made to the "legislative judgment" that filled milk is

"an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public". That "judgment" related to the 1923 product; it is unquestionably not true of the product as presently compounded.

(2) On page 17, respondent states that the evidence at the Congressional hearings made it debatable whether or not filled milk should be banned "in the interest of health and the prevention of deception". That may have been true of the 1923 product; it is not true of the present one.

(3) On page 18, it is said that the legislative judgment that filled milk "was injurious to the public health" was based in large part upon the fact that most of the vitamin content of whole milk was removed when the butter fat was extracted, and was not replaced by the oil "fillers" by which the residual skimmed milk was converted into filled milk. That was true of the 1923 product; it is not true of the Carolene of today.

(4) On the same page, in a footnote, reference is made to a Congressional finding that the compound "is injurious to the public health", because of its "deficiencies". These "deficiencies" do not exist in the Carolene of today, and it is *not* injurious to the public health.

(5) On page 21 is quoted the statement of the House and Senate Committees that "The sale of the compound violates the spirit, if not the letter, of the Pure Food and Drugs Act", and also the statement of Congressman Voigt, the sponsor of the Act, that the proposed bill was "intended to cut off the fraud". These statements were made in reference to the vitamin-deficient product of 1923; they are inapplicable to the Carolene of today

(6) Again, on page 52, it is said that "filled milk" is a product "with the most valuable constituent abstracted". That statement flies in the face of all the testimony, which is that the Carolene of today is a product in which this "most valuable constituent" is present, not only in an amount equal to that of whole milk, but even in a greater and more constant amount.

(7) On page 29, respondent asserts that the "judgment of Congress * * * was that the needed public protection could be secured only by outright prohibition of filled milk", and upon that determination it is suggested that the Congressional prohibition was intended to extend to petitioner's product. But the Congressional proceedings will not sustain that contention. To the contrary, they show a purpose to prohibit only a product so deficient in nutritive value as to be injurious to public health. No legislative judgment was passed on the question of the need, or the absence of need, for prohibition, or even regulation, of a product like the Carolene of today, which is in nutritive value, the equivalent of whole milk. That question was not presented because the Congress was assured that the equivalent product was a commercial impossibility. Respondent's argument only emphasizes the fact that the statute was not intended to apply to a commodity like the present-day Carolene.

The confusion thus created is worse confounded by respondent's references, in discussing the *present* product, to language in judicial opinions dealing with the *1923* product; thus

(1) On page 24, it is said that the decision in the earlier *Carolene Products* case (304 U. S. 144) "fully justified" the courts below in concluding that the Act

has constitutionally prohibited the shipment of Carolene, and on page 36 the earlier case is again cited for the proposition that this Court concluded that the question whether or not filled milk should be prohibited was "debatable". The earlier *Carolene* case involved the former, vitamin-deficient product, and arose on a demurrer, by which defendant there admitted the allegation of the indictment that defendant "fraudulently * * * shipped in interstate commerce * * * a certain adulterated article of food injurious to the public health". What was said in that case concerning filled milk and the Congressional findings in reference thereto has no relation to Carolene as it is compounded today.

(2) On page 38, the earlier *Carolene Products* case is again referred to as authority for the proposition that the evidence before Congress justified the conclusions that "filled milk" is "generally injurious to health and facilitates fraud on the public", and that the danger is greatly enhanced where "an inferior product" is involved. These conclusions related to the vitamin deficient product; they are inapplicable to the Carolene of today.

(3) On page 51, respondent, referring to the earlier *Carolene* case, says that "this court has already sustained the Congressional finding that the sale of filled milk 'constitutes a fraud upon the public'". What this Court said in the earlier *Carolene* case in reference to that finding related to the 1923 product; the finding was not made, and would not be justified, as to the Carolene of today.

Thus, there runs through respondent's brief the misleading innuendo that the Congressional findings of vitamin

deficiency and resulting danger to public health, and this Court's sustaining of the Act on its face in the earlier *Carolene* case, because of these Congressional findings, are arguments in support of the judgment below. Yet respondent admits (brief, p. 9) that the evidence offered by petitioner, had it not been rejected by the court, would have shown that the vitamin deficiency referred to by Congress in 1923

> "has now been remedied in the case of Carolene * * * "

and that (p. 28) it may be conceded

> "that Carolene, by the new process of fortification, now contains vitamins A and D to a point equalling or exceeding that of whole milk".

In view of this change in the character of the product, and the Government's admission (brief in opposition to application for a writ of certiorari, p. 8), that

> "Congress was unaware, of course, that vitamins lost through removal of the butter fat from milk might conceivably be artificially replaced",

it is impossible to understand respondent's present statement (brief, p. 37) that the evidence offered, and rejected, below was "merely cumulative, and can hardly render the issue less debatable" than it was in 1923.

The record establishes beyond dispute that what was "debatable" in 1923 is no longer "debatable": the product which, in 1923, was "injurious to public health" and therefore a "fraud upon the public", though still known by the same name, is not the Carolene of today, and the Carolene of today is at least as wholesome as whole milk itself, if not more so.

In an effort to avoid the effect of the undisputed facts, respondent argues (brief, pp. 38-9) that the proof offered by petitioners was insufficient because it related only to the unconstitutionality of proscribing Carolene, and not to the need for proscribing filled milk "generally". Petitioner is, of course, not concerned with the constitutionality of banning filled milk "generally". A statute may be constitutional with respect to other products within the statutory definition of filled milk, and yet unconstitutional as to a product which, though within the strict definition, is demonstrably not within the rationale of the Act.* Whether or not there is constitutional justification for proscribing a product which offends in the respect that "filled milk" did in 1923 is not material here: we are concerned only with whether or not the Carolene of today, which was not known or believed possible in 1923, and which does *not* so

* This is well settled by the cases holding that a statute, though valid when enacted, may become arbitrary and confiscatory by reason of later developments (our principal brief, pp. 23-25) and those holding that though a thing be within the letter of a statute, it is not within the statute if not within its spirit or the intention of its makers (our principal brief, pp. 18-20). Respondent seeks to avoid the application of these doctrines by arguing that they do not stand for the proposition that "general words" in a statute will be given a construction which the legislature did not intend (brief, pp. 26-7). That argument is a man of straw: there is no attempt here to give general words a construction that Congress did *not* intend; all petitioners urge is that the words used by Congress should be given the construction that Congress *did* intend, and that its language should not be extended to things it did *not* intend. The *Holy Trinity* case and the other cases cited by us in our principal brief (pp. 18-20) are, we submit, persuasive authority for the proposition that the Act should not be construed to apply to the Carolene of today. So to construe the Act would not result in an "implied exception by judicial construction" (respondent's brief, pp. 29-30); it would merely give the Act the construction which Congress intended it to have. Nor is the construction contended for by us in any respect inconsistent with the proposition that Congressional proscription may, in a proper case, extend to articles not then known (respondent's brief, p. 29, footnote). Such extension, however, can occur only if the subsequently developed article falls within the rationale of the earlier legislation.

offend, shall be deemed to have been within the legislative intention at that time, and if so, whether or not, as to such a product, the statute is constitutional. . .

The necessity for proving that the Act is unconstitutional "generally", and not merely as to Carolene, is said by respondent (brief, pp. 39-40) to be established by the *Powell* case (127 U. S. 678). That case, decided almost 60 years ago by a divided court, has been limited, if not overruled, by later decisions here. To argue that a statute may not be shown to be unconstitutional as to a particular situation, unless it be shown that the statute is unconstitutional "generally", is to ignore the long line of cases in this and other courts which hold distinctly and emphatically that where it appears from the legislative history of a statute that a particular situation was not intended to be covered by the general words of the Act, or that the Act would be unconstitutional if applied to that situation, the Act will be construed not to extend to it.

On this point, and as applicable to this precise situation, the prior *Carolene* case in this Court (304 U. S. 144) is directly in point. There the Court said (pp. 153-4, italics ours):

> "Similarly we recognize that the constitutionality of the statute, valid on its face, may be assailed by proof of facts tending to show that the statute *as applied to a particular article* is without support in reason because the article, *although within the prohibited class*, is so different from others of the class as to be without the reason for the prohibition. * * *"

Paraphrasing the *Quaker Oats* case (318 U. S. 218), respondent refers to Carolene as "an economically adulterated product" (brief, p. 12) and, upon that alleged coincidence, discusses the *Quaker Oats* case at length (pp. 48-51). In truth, however, Carolene is not an "economically

adulterated product", and the *Quaker Oats* case is totally irrelevant to any question here involved.

"Economic adulteration" as this Court defined it in the opinion of Chief Justice Stone in the *Quaker Oats* case, is a process whereby the cost of production is diminished

> "so as to make the product, although not in itself deleterious, *inferior to that which the consumer expected to receive* when purchasing a product *with the name under which it is sold*."

Hence, Carolene is not an "economically adulterated product" for two reasons: First, it is not "inferior" to milk but, on the contrary, is as good, if not better (respondent's brief, pp. 9, 28), and, second, it is not sold as milk, but by a trade name and under a label which distinctly states if is not milk (R. 17).

Another quotation from the *Quaker Oats* case, torn from its context and made to appear applicable here simply because Carolene is vitamin-fortified, is the statement in respondent's brief (p. 12) that purchasers of vitamin enriched food "have been found by this court to be peculiarly susceptible to unfair and dishonest market practices". That statement is misleading when applied to this case; what the Court said (p. 229) was that purchasers "under such conditions" are susceptible to dishonest and inferior marketing practices, the reference to "such conditions" being the public inability to recognize "interior or unsuitable vitamin content" of food products having the same general commercial name. To repeat, Carolene is not sold under "the same commercial name", and the proof offered by petitioners, and rejected below, would, if received, have shown that Carolene is *not* "inferior" and is *not* of "unsuitable vitamin content".

Respondent argues (brief, p. 45) that it is "unimportant" that Carolene is as wholesome as milk, if it is "susceptible

of being used as an instrument of fraud and deception or consumer misunderstanding and confusion". In the case cited by respondent (brief, p. 45, footnote) for that broad statement (*People* v. *Arensberg*, 105 N. Y. 123), as the opinion shows, "devices" (p. 129) and "artificial means, not essential or incident to the manufacture of the article" (p. 130) had been used "for the mere purpose of making oleomargarine resemble creamery butter" (p. 133), and the oleomargarine was marketed "in such a form and manner as to be calculated to deceive" (p. 129). Obviously, that case is no authority for the proposition for which respondent cites it; that case does not hold that a wholesome article, honestly labeled and sold, as Carolene is, may be banned simply because it looks, tastes and smells like another, if the resemblance is due to the necessary ingredients and not to artificial simulation. Indeed, the *Arensberg* case makes that very distinction. Thus, at page 129, the Court said:

> "If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects, but they may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance."

And further, at page 130:

> "The statutory prohibition is aimed at a designed and intentional imitation of dairy butter, in manufacturing the new product, and not at a resemblance in qualities inherent in the articles themselves and common to both."

With complete disregard of the distinguishing facts, respondent (brief, p. 48) cites from the *Arensberg* case, as if it were applicable here, the disconnected statement that "the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other". What made the act fraudulent in the *Arensberg* case was not mere difference in cost, but difference in cost of an artificially doctored and designedly dissembled product. The distinction is too obvious to justify further discussion.

In similar vein are respondent's references (brief, pp. 14-15, 48) to the observations in the *Hebe* case (248 U. S. 297) concerning the magnification of a fraud by adding ingredients to make a "cheaper and forbidden substance more like the dearer and better one". That quotation is inapplicable to the facts of the present case, and is hardly fair inasmuch as the compound in the *Hebe* case was "an inferior product", whereas Carolene is not "inferior", even to milk. Strangely enough, respondent says (brief, p. 50) the label is "misleading by virtue of the very fact of its truth",—this most extraordinary indictment being based, forsooth, on the fact that the label truthfully shows that Carolene has a greater vitamin content than condensed or evaporated whole milk!

Respondent cites *Hebe Co. v. Shaw*, 248 U. S. 297, as a precedent for "the constitutionality of state legislation" of the character of the filled milk act. The case does not sustain that burden. It deals rather with the question of the constitutionality of a statute which prohibits the sale of condensed skimmed milk because it fails to meet minimum nutritional standards fixed by the statute (see *U. S. v. Carolene*, 304 U. S. 144, at p. 148). By judicial construction, the statute was interpreted to justify the proscription of a compound of condensed skimmed milk and vegetable oil, because the admixture of vegetable oil did not cure the inferiority but merely increased the possibility of deception.

There is a wide difference between that statute, having for its purpose the fixing of minimum nutritive standards, and the Federal filled-milk statute, which arbitrarily prohibits the admixture of a non-butter fat with milk, even though the resultant compound is more nutritious than milk, and therefore cannot be justified as a minimum standard provision. That difference in itself disputes the suggestion that the *Hebe* case is a precedent in this court for the constitutionality of state analogues of this Act. But there is a further and more important difference. The decision in the *Hebe* case is based altogether on the power of the state to prescribe minimum standards for commercially prepared foods. There is no warrant for the suggestion that the case would have been decided in the same way if Hebe had met the nutritional standards fixed by the Ohio statute. It is postulated, even by the respondent, that petitioner's product is as good or better than milk. That concession is, in effect, an admission that no rational regulation or minimum standard provision could possibly exclude Carolene without proscribing milk itself. The *Hebe* case was decided on the proven fact that a compound of condensed skimmed milk and vegetable oil was inferior to the minimum standard fixed by the statute. Here, on the contrary, the district court refused to receive proof that petitioner's product was not inferior and therefore not one of the products which Congress intended to proscribe. It was the contention of the Government at the trial, as it is here, that the whole question of the character and nutritive value of petitioner's product is so foreign to the case that it was proper for the trial judge to preclude any proof on that head, even when offered by petitioners as a defense. The *Hebe* case is not an authority either for the constitutionality of state analogues of this statute or for the assertion that petitioners have had their day in court.

Recognizing that if the vitamin deficiency of filled milk was the rationale of the Act, the vitamin-fortified Carolene of today is not within it, respondent argues (brief, pp. 11-30) that the Act should, nevertheless, be extended to Carolene unless it is rationally inconceivable that Congress might have intended to cover filled milk products "irrespective of vitamin enrichment". Whatever may be the rule in a case where the reason for the enactment of a statute is unknown, no such conjectural method may be indulged in a case where, as here, the legislative history of the Act clearly discloses its rationale. In such a case, a subject matter not within the stated rationale may not be brought within the Act upon the speculation that if Congress had not acted for the reason given by it, it might, nevertheless, have acted for some other.

Nor is the argument aided by the doctrine of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192. That case acknowledged legislative authority to prohibit a non-alcoholic malt liquor in order to enforce prohibition of alcoholic liquors, because of the notorious fact that malt liquor could easily be converted into an alcoholic liquor.

Respondent's reference (brief, pp. 13-14) to the "legislative policy" of more than "three quarters of the states" in "rigidly controlling the exploitation of filled milk", as bearing upon the constitutionality of the Act, is disingenuous. There has been no test of the constitutionality of the great majority of these state statutes. Moreover, not all of them provide for flat prohibition as the Act here involved does; some are merely regulatory. Of the nine state statutes which have come before the courts, three providing for flat prohibition have been held unconstitutional (*Carolene Products Co.* v. *Thomson*, 276 Mich. 172; *Carolene Products Co.* v. *Banning*, 131 Neb. 429; *Carolene Products Co.* v. *McLaughlin*, 363 Ill. 62), and a fourth has

been held inapplicable to Carolene as now compounded (*State ex rel., McKittrick* v. *Carolene Products Co.*, 346 Mo. 1049). Of the remaining five, two are irrelevant; because they related to the former vitamin-deficient product (*Carolene Products Co.* v. *Harter*, 329 Penn. 49; *State ex rel. Carnation M. P. Co.* v. *Ewing*, 178 Wis. 147). The situation in the other three is this: one (*Carolene Products Co.* v. *Hanrahan*, 291 Ky. 417) was decided on the theory that the earlier Carolene decision in this Court foreclosed consideration of the merits—an erroneous premise in view of the fact that the earlier case here, which involved the vitamin-deficient product, arose on demurrer which admitted that the product was an "adulterated article of food, injurious to the public health"—and both the other two were decided by courts divided four to three. In one of these (*Setzer* v. *Mayo*, 150 Fla. 734) both minority and majority agreed that the statute would be inapplicable to Carolene if it were shown that Carolene is as nutritious as milk, and the other (*State ex rel. Mitchell* v. *Sage Stores*, 157 Kan. 404) is up for review here with the present case (No. 34, this Term). In both these cases, it should be noted, the courts recognized the right to introduce the type of evidence which the courts below, in the present case, refused to receive.

Recognizing again that if the vitamin deficiency of filled milk was the rationale of the Act, it could not be extended to the vitamin-fortified Carolene of today, respondent argues that Congress was also motivated by two other considerations, i.e., (1) the danger of "fraud, deception and consumer misunderstanding and confusion" from the fact that filled milk resembles condensed milk in looks, taste and smell (brief, pp. 11, 12, 18, 42, 46), and (2) that cocoanut oil, one of the ingredients of filled milk, was produced by

"cheap labor" and sometimes under "unsanitary" conditions (brief, pp. 18, 28).

The second alleged reason need not detain us long. It is true that in the hearings before the Congressional Committee, reference was made to coconut oil being an "oriental commodity" produced under unsanitary conditions. But the dairy interests, intently as they labored to eliminate the competition, could not maintain that objection. It collapsed completely—and was not attempted to be revived—as soon as it was shown that coconut oil is rendered sterile by the refining process necessary to its use in filled milk (R. 898, 9) and that filled milk was manufactured in the very same plants, and by substantially the same process, as condensed milk* (R. 602).

This brings us to respondent's contention that an independent purpose in the adoption of the Act was the prevention of "fraud, deception and consumer misunderstanding". A study of the testimony adduced before the Congressional Committees and of their reports shows that Congress had no such independent purpose in mind, except as it was incident to the prevention of the sale of a vitamin-deficient product, and even then, only in the diet of infants.

A review of the Congressional proceedings recreates this scene:

The proponents of the bill confessedly desired its passage in order to spare the dairy interests from competition with filled milk. But Congress professed its unwillingness to "use

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* This is frankly admitted in the brief of the learned Attorney General of the State of Kansas in the brief filed by him in the *Carolene* case coming up at this term (No. 34) from the Supreme Court of that state. On page 12 of that brief, it is said:

> "The product is manufactured in sanitary creameries in the same manner as whole or skim milk is evaporated in the manufacture of evaporated milk. • • • The product is put up in hermetically sealed cans, thoroughly sterilized, in the same manner as canned, evaporated whole milk, and is free of bacteria."

the dread power of legislation to foster one industry in order to destroy another" (R. pp. 1371, 1373). There ensued an effort at rationalization of the bill in terms of public welfare. Filled milk was thereupon denounced by a succession of scientific witnesses as a hazard to the health of children. "There is absolutely no principle in it that will contribute to the growth of the child", said the bill's sponsor, Congressman Voigt (R. p. 324); others painted the effects on the infant child in even more dire terms (R. pp. 357, 373, 537, 758, 797). To ensure the efficacy of this scientific testimony, an emotional note was introduced. "We knock at the door of death when we bring forth that child and we are going to see to it that it is properly nourished", an earnest lady from New York told them (R. p. 779).

Mr. Gernerd exhorted the House to "stand by the babe of the Nation and the dairy cow" (R. p. 694).

Mr. Towner thought the bill was constitutional because intended "to protect the lives of the children of the United States. * * * If a fraud is being perpetrated *which is injurious to the health of the babies and the children of the United States*, ought we not to do our part to try to prevent it?" (R. p. 649).

In the Senate, Dr. Goldberger, the Public Health Service specialist in deficiency diseases, then at the height of his fame as the discoverer of the causes of pellagra, assured the Senate that filled milk was neither deleterious in any proper sense of that word (R. p. 1265) nor could it be called adulterated if honestly labeled (R. p. 1266). He thought that despite its vitamin deficiency, filled milk was an important and valuable article of food in the same sense that white bread, though deficient in the ingredients removed in the milling process of the flour, was an important article of diet (R. p. 1270). Nevertheless, the demonstration of the comparative inferiority of filled milk as compared with condensed milk, in terms of vitamin content, had been impressed

upon the Committee members who, like their colleagues in the House, had been assured that the deficiency could not be repaired. It was in this setting that the Committee heard conflicting and contradictory testimony as to asserted confusion and deception in consumer acceptance of filled milk.

The comments on both the House and the Senate floor on the question of "fraud" or "confusion" or "deception" show that the members of Congress, insofar as they predicated the passage of the bill on an attempt to prevent confusion or deception or fraud, had in mind only a desire to protect the ignorant or unthinking consumer from getting *a vitamin-deficient product* in place of milk. Thus, Mr. Voigt, the bill's proponent, said (R. 603):

> "I will say that the filled milk is not a poisonous product, but it is a fraudulent product, in that the consumer is not getting what he thinks he is buying. The evidence adduced before our committee was overwhelming that the filled milk was sold on the shelves of the retailers side by side with the genuine article, and in most cases it was being sold for the same price. I object to filled milk not so much for what is in it *as for what is not in it.*"

Mr. Reed of New York said:

> "* * * the evidence * * * convinces me that this product is not as good as milk and ought not to be permitted to be sold. The man, woman or child who goes to a store to purchase milk should be protected against any attempt to foist on them a substitute *that does not contain the nourishing elements of genuine milk*" (R. p. 707).

When the bill reached the Senate floor, the Towner Amendment, declaring that filled milk was an "adulterated and deleterious article of food" was withdrawn.

The Government suggests (p. 29) that the reason for this charge was a Congressional intention to prohibit any filled milk, whether or not deleterious. But the true reason for the charge will be found in the testimony of Dr. Goldberger. He testified: "In my judgment that would not be a correct use of the word deleterious"; it was his opinion that filled milk "is a wholesome and nutritious article of food, and that in the usual conventional use of the word deleterious that would not be a proper qualification of it" (R. p. 1265). The Committee's report had urged the passage of the bill as a constitutional exercise of legislative authority for the reason that filled milk was "inferior" (R. p. 1308); the argument was reiterated upon the floor of the Senate, and Senator Cummins' opinion that the bill was constitutional because of the injurious effects of the use of filled milk" was cited (R. p. 1314).

It is clear that the only reason for the adoption of the Act was the inferiority of filled milk because of its deficiency in vitamins A and D. Because of that inferiority, Congress feared that the use of the compound would result in "injury to the public", and so the Statute declares; and it was only because of that inferiority that Congress thought the sale of filled milk would work a "fraud". This is frankly conceded in the brief filed for the State of Kansas in the *Carolene* case which is here from the Supreme Court of that State and is to be heard with this one (No. 34). At page 27 of that brief the learned Attorney General of the State of Kansas says (italics ours):

> "The evil that Congress and the Kansas Legislature struck at in 1923 was an adulterated milk product stripped of nutrients and palmed off on the public as the genuine article, *thereby* affecting the public health and facilitating fraud and deception"

and at pages 40-41 of the same brief:

> "It is evident that when Congress and the Kansas Legislature considered filled milk in 1923 they were not deceived as to the evil they intended to prevent. They intended to prevent the palming off on the public of *an inferior milk compound, stripped of elements essential to the diet of the people, and the maintenance of health,* and which articles could not be distinguished from the genuine article, and which was actually sold and used by the consumer as and for the genuine article, and *not knowing that it did not contain the essentials expected of it,* thereby promoting malnutrition." (Italics ours.)

On the whole Congressional record it is clear that the deception Congress sought to prevent was the sale of a compound which was made to look like milk, but was deficient in the vitamins A and D found in milk. That concern became the more insistent as a result of proof, then undeniable, that vitamin equivalence was an impossibility. Since this was the setting in which the Act was adopted, petitioners were entitled to an opportunity to show the vitamin equivalence of their product. That demonstration would then have become the factual basis for the pertinent argument that Congress had not intended to ban a product like Carolene, which contains vitamins A and D in at least as great a degree, and with a greater constancy, than milk itself. For it is beyond dispute that whatever importance may be attached to the Congressional apprehension about deception, as a result of a retrospective examination of the Congressional mind as it is disclosed from a reading of the Congressional proceedings, it must be completely clear that the possibility of deception was debated only in connection with filled milk devoid of vitamins.

Thus it is clear that "injury" and "fraud" were the corollaries of the finding of inferiority; they were not, as the Government suggests, alternative independent motives for the adoption of the Act, and the Act may not be sustained as to Carolene on the Government's theory that even though the vitamin deficiency in filled milk has been cured in Carolene, it is nevertheless within the Act as a product which Congress believed would be injurious to, and a fraud upon, the public.

Moreover, respondent's argument on "fraud and deception" is self-defeating. In one breath it urges that the Court correctly rejected petitioners' offer to prove that the Congressional concern about confusion and deception had nothing to do with petitioners' product; in the next it seeks to sustain the judgment below by arguing that the proof offered was insufficient to establish the fact so sought to be proved. Obviously, the Court's refusal to *receive* competent, relevant and material evidence cannot be justified by respondent's assertion that, had it been received, the Trial Court would have found it *insufficient* to establish the fact sought to be proved thereby.

The Government recognizes (brief, p. 24, footnote) that this Court laid it down in the earlier Carolene case that (304 U. S. 144, 152)

> "* * * a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

Yet, that is precisely the effect of what has been done here: the learned courts below have put their decisions squarely on the ground that the Act precludes the disproof

in judicial proceedings of facts which would show that the statute has no rational basis as to Carolene; they have said in so many words that their conclusion is "harsh and inequitable", but relief must come, not in judicial proceedings, but from Congress (R. p. 51; 140 Fed. (2) 61, 64). That ruling, we submit, was erroneous and has been assigned as a ground of error. The error cannot be minimized by respondent's assertion (brief, p. 24) that the point is "merely ancillary" to what respondent chooses to call the "basic controversy". As we view it, the question whether or not the courts below committed error in rejecting petitioners' proffered evidence is the basic controversy, and it now appears, as we read respondent's brief, that the error is not seriously disputed.

II.

Imitation or Semblance.

On this subject the respondent is inconsistent. It does not dispute that the words "imitation or semblance" in the Act were borrowed from a statute in New York and an earlier Federal statute, both dealing with food products, and that in both those statutes these words had previously been construed to mean intentional simulation; neither does it dispute the rule that where words of a statute are later used in another of similar character; they are to be construed in the latter as the Courts had previously construed them in the former. Respondent argues merely (brief, pp. 32-3) that this case is an exception to the rule; that Congress could not have meant intentional simulation when it used the words "imitation or semblance" in the Act because it intended by those words "specifically" to ban the old Carolene, whose resemblance to milk was not the result of intentional simulation. Respondent forgets that as it points out elsewhere (respondent's brief, pp. 45-6) the drafts

man of the Act, Congressman Voigt, told Congress "that the only purpose of the addition of a vegetable oil is that 'of making milk appear as cream, or skimmed milk as evaporated milk.'" Hence, though erroneously, Congressman Voigt believed, and evidently Congress did too, that there *was* an intentional simulation of milk in the compounding of the old Carolene.

Moreover, Congress did not ban *every* product in imitation or semblance of milk; what it banned was a product which, while having the deficiencies then inherent in "filled milk", was made to resemble milk. In short, it banned any product which was made to look like milk, but did not have the vitamins found in milk. The Carolene of today is not such a product: it is not deficient in the vitamins found in milk; on the contrary, it has those vitamins in at least as great a degree as whole milk itself.

No one can question the desirability of saving, for public consumption, as much of our skimmed milk as possible. It is concededly the "most nutritive fraction of whole milk" (R. p. 159), wholesome "in every sense of the word", and not injurious (R. pp. 159-160, 191-2; 255) even to a child (R. p. 180). If we may follow respondent's practice (brief, pp. 46-7, footnote) and refer to the record in the *Kansas* case which is to be argued with this one, almost fifty billion pounds of skim milk, concededly an excellent food, are fed to animals or destroyed each year—absolutely wasted as far as human consumption is concerned—although there is a great shortage in this country of the food factors of skim milk (Kansas Record, Finding 13, p. 497). The extent to which petitioners save this valuable food product, and devote it to human needs, is indicated by the fact that in 1940, Litchfield Creamery Company, which manufactures Carolene for petitioners, purchased more than $2,000,000 worth of whole milk, the skim milk from which was used

to make 1,100,000 cases of Carolene (Kansas Record, Finding 23, p. 504).

The product is wholesome, nourishing and in no way injurious to health (R. pp. 160-1, 175-6, 179-180, 212). It is more constant, and of a superior quality, than other feeding combinations (R. p. 177) and is "in every way fit for human consumption" (R. p. 155).

With the foregoing observations in mind, it is appropriate to recall the *Weaver* case (270 U. S. 402), in which this Court said (p. 413) that

> "it is a matter of public concern that the prohibition and sale of things necessary or convenient for use should not be forbidden"

and that a "legitimate and useful business", though "subject to all reasonable regulation" may not be made the object of "absolute prohibition". To do so, said the court (p. 415)

> "is purely arbitrary and violates the due process clause of the Fourteenth Amendment"

Respondent admits (brief, p. 53, footnote) that the *Weaver* case would be in point if the objection to the Carolene of old had been on "sanitary" grounds. That is obviously not a ground of distinction. Whether the objection to the old Carolene was on sanitary grounds or on vitamin-deficiency grounds is clearly immaterial; the fact remains that the Carolene of today is one of the most nutritious foods in the human diet. It is "a matter of public concern" that the use of such a commodity "should not be forbidden", the manufacture and sale of it is "a legitimate and useful business", which, though "subject to all reasonable regulation" may not be the object of "absolute prohibition". Here, as in the *Weaver* case, to do so

"is purely arbitrary and violates the due process clause of the Fourteenth Amendment."

A similar conclusion was reached by the New York Court of Appeals in *People* v. *Biesecker*, 169 N. Y. 53, a case involving the constitutionality of a statute prohibiting the use of anything except salt or sugar as a preservative. The Court said that the cases establish certain propositions, one of which is (p. 57):

"That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food."

In holding the statute unconstitutional, the Court said (p. 58):

"The statute before us cannot be justified as an exercise of power to prevent fraud or imposition on buyers and consumers. Doubtless the legislature could provide that where butter contains any preservative except salt or sugar the package should be clearly marked with a label stating such fact, and it might require any notice adapted to informing the public of the nature and treatment of the article offered for sale. This it has not done, but it has absolutely forbidden the sale."

Conclusion.

The doctrine of the judgment below is this: A criminal prohibitory statute must be *broadly* construed and *literally* enforced, even though in consequence the act of translating scientific advances into terms of the public welfare is thereby made a crime. It is a part of that doctrine that such conduct is so indefensible that the defendant will not even be heard when he attempts to show that although the thing which he produced answers superficially the descrip-

tion of a prohibited article, it is not that article. The superficial resemblance condemns it and him so conclusively that he will not be permitted to prove that the thing he has produced was not intended by the legislature to come within the prohibition; that his product was undreamed of when the statute was passed, and that its use will benefit all the people in a way that was then thought impossible. He is told that, harsh and inequitable as the result is, the courts are powerless to inquire whether a criminal statute intended to proscribe a deficient thing was intended to apply to a newly invented commodity equal or better than anything ever produced before it and undreamed of at the time of the passage of the Act.

Such a doctrine shocks the conscience, and unless there is no escape from it, it should not be applied. The concepts which underlie our system of government suggest that no such harsh and inequitable result is mandatory. The balance of power between the courts and the legislature will not be undone if petitioners are permitted to prove the nature of their product and that it does not fall within the rationale of the Congressional proscription.

The decision below can be sustained only at a great cost: the declaration of a rule that a criminal statute must be broadly construed and rigidly enforced in all circumstances, however violative of the original legislative intention the result of such an application may be. In this case, that rule condemns scientific progress, makes criminal the practical use of that progress, and prevents the business man who distributed the fruits of the progress from offering a defense. Neither the precepts of the Constitution, nor the concepts of the common law by which we have largely interpreted it, are so rigid as to require the result reached below. For it is old law that the rationale of a statute is a better guide to its meaning than the formalism of words, particularly where the statute is attempted to be applied

to circumstances unknown, unexpected and unintended when the law was adopted. Adherence to that rule would have afforded petitioners a trial; rejection of it has denied them one. The judgment should be reversed, that they be given their day in court.

Respectfully submitted,

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